

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Cease and Desist Order
Issued to Maple Oaks Funeral Home and
Phalen Park Funeral Home

**RECOMMENDATION THAT REQUEST
FOR STAY OF CEASE AND DESIST
ORDER BE DENIED**

This matter came before Administrative Law Judge Stephen D. Swanson upon a Referral of Request for Stay of Cease and Desist Order dated May 21, 2015. Margaret Jacot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department). Michael D. Sharkey, Cousineau McGuire, appeared on behalf of Respondents Maple Oaks Funeral Home and Phalen Park Funeral Home (Respondents).

On May 15, 2015, the Department issued a Cease and Desist Order to Respondents. By letter dated May 18, 2015, Respondents duly appealed from the Cease and Desist Order. By letter dated May 19, 2015, Respondents made a request for a stay of the Cease and Desist Order. The Department declined to grant the request, and referred the request to the undersigned pursuant to the provisions of Minn. Stat. § 149A.08, subd. 4 (2014).

Based upon a discussion with counsel during a telephone conference on May 21, 2015, the Department submitted the Referral of Request for Stay of Cease and Desist Order, and an Affidavit of Darcy Miner. Respondents submitted a letter brief dated May 21, 2015, and a supplemental letter brief dated May 22, 2015. The Department submitted a Memorandum in Opposition to Request for Stay dated May 22, 2015, accompanied by Affidavits of Carlena Weiland and Margaret Jacot.

Based upon these submissions, the hearing record, and for the reasons stated in the Memorandum which follows, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the Commissioner of the Department of Health **DENY** the Respondent's request for a stay of the Cease and Desist Order.

Dated: June 1, 2015

s/Stephen D. Swanson
STEPHEN D. SWANSON
Administrative Law Judge

NOTICE

This Recommendation is not a final decision. Pursuant to Minn. Stat. § 149A.08, subd. 4, the Commissioner of Health will make the final decision whether to grant or to deny the request for the stay of the Cease and Desist Order within five calendar days after receiving this Recommendation.

MEMORANDUM

I. Introduction

At this stage of the proceedings, this case is before the Administrative Law Judge for the limited purpose of making a recommendation to the Commissioner of Health (Commissioner) on the request for a stay.¹ A date for an evidentiary hearing on the Department's claims will be set during a prehearing conference to be held on June 16, 2015.

In accordance with the provisions of Minn. Stat. § 140A.08, subd. 4, the Administrative Law Judge's review of the request for a stay is extremely expedited. If the Commissioner elects not to grant a request for a stay of a cease and desist order, the Commissioner must refer the request to the Office of Administrative Hearings within three working days of the receipt of the request, and the assigned administrative law judge has 10 calendar days from the receipt of the referral to make a recommendation to the Commissioner whether to grant or deny the request for a stay.² In this case, the Department's Referral of Request for Stay of Cease and Desist Order was received by the Office of Administrative Hearings on May 21, 2015. The tenth calendar day following the receipt of the referral falls on Sunday, May 31, 2015. Accordingly, the final day for the submission of the Administrative Law Judge's recommendation is Monday, June 1, 2015.³

To assist the Administrative Law Judge in reviewing the request for a stay and making a recommendation to the Commissioner, the Department has submitted the documents which provide the background for the referral, and the parties have submitted written argument.

II. Factual Background and Procedural History

Respondents Maple Oaks Funeral Home and Phalen Park Funeral Home are affiliated companies and operate from the same location.⁴ Respondents' funeral establishment is operated pursuant to license numbers 0618 and 0039 issued by the

¹ Minn. Stat. § 149A.08, subd. 4.

² *Id.*

³ Minn. R. 1400.6100, subp. 1 (2013).

⁴ Respondents' letter brief dated May 21, 2015 ("Letter Brief").

Department.⁵ Following an inspection of the facility by Carlana Weiland, an investigator employed by the Department,⁶ the Department issued an Administrative Penalty Order (APO) to Respondents dated March 19, 2015.⁷ The APO alleged unclean and unsanitary conditions in the receiving and embalming rooms, and missing certificates of removal and preparation, and embalming records.⁸ The APO required Respondents to take specific corrective actions and assessed a forgivable penalty in the amount of \$5,000 and a non-forgivable penalty in the amount of \$15,000.⁹ Respondents did not appeal the APO.¹⁰

Respondents did not take the corrective action prescribed in the APO and did not pay the penalties.¹¹ Following two re-inspections of the facility, the Department issued the Cease and Desist Order dated May 15, 2015.¹² In the Order, the Department found that conditions in the preparation and embalming rooms had worsened.¹³ Respondents are ordered to cease removing any dead human body from the place of death; preparing dead human bodies for final disposition, including embalming, cremating, washing, dressing, and casketing bodies; and transporting dead human bodies.¹⁴ Respondents are also ordered to dispose of infectious and pathological waste as required by law; to advise clients to find another provider of services; and to immediately restore the preparation and embalming rooms, equipment, and supplies to a clean and sanitary condition.¹⁵

By letter dated May 18, 2015, Respondents duly appealed from the Cease and Desist Order and requested a hearing.¹⁶ In the Appeal Letter, Respondents take issue with the accuracy of a number of the findings of fact in the Cease and Desist Order.¹⁷ By letter dated May 19, 2015, Respondents requested a stay of the Cease and Desist Order.¹⁸ In their Stay Request Letter, Respondents indicate that they are complying with the Cease and Desist Order, and confirm that significant cleaning work must be performed at the facility.¹⁹

⁵ Cease and Desist Order at 3, attached to Affidavit of Darcy Miner dated May 21, 2015, as Exhibit (Ex.) 2.

⁶ Affidavit of Carlana Weiland dated May 22, 2015, para. 2.

⁷ Administrative Penalty Order dated March 19, 2015, attached to Miner Affidavit as Ex. 1.

⁸ *Id.* at 1.

⁹ *Id.* at 3-5.

¹⁰ Minnesota Department of Health's Memorandum in Opposition to Request for Stay (Department Memorandum) at 2.

¹¹ Miner Aff., para. 2.

¹² *Id.*, para. 3; Weiland Aff., para. 3.

¹³ Cease and Desist Order at 4.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 5, 6.

¹⁶ Miner Aff., para. 5 and Ex. 3 (Appeal Letter).

¹⁷ Appeal Letter at 1-3.

¹⁸ Miner Aff., para. 6 and Ex. 4 (Stay Request Letter).

¹⁹ Stay Request Letter.

The Department declined to grant the request for a stay, and referred the request to the Office of Administrative Hearings.²⁰ The Department declined to grant the request based upon “the nature of the violations at issue and the potential for Respondents to harm the families of decedents by treating decedents’ bodies disrespectfully.”²¹

III. Applicable Law

The question for determination by the Administrative Law Judge at this stage of the proceedings in this case is whether to recommend to the Commissioner that the Commissioner grant Respondents’ request for a stay of the Cease and Desist Order or to recommend that the Commissioner deny that request. That determination must be made within the framework of the statutory scheme embodied in Minnesota Statutes, chapter 149A (2014).

The stated purpose of chapter 149A is to regulate “the removal, preparation, transportation, arrangements for disposition, and final disposition of dead human bodies for purposes of public health and protection of the public.”²² Section 149A.08, subdivision 1, authorizes the Department to issue cease and desist orders in two separate circumstances:

Subdivision 1. Authorization. In addition to any other remedy provided by law, the regulatory agency may issue a cease and desist order to:

(1) stop a person from violating or threatening to violate any law, rule, order, stipulation agreement, settlement, compliance agreement, license, or permit which the regulatory agency is empowered to regulate , enforce, or issue, or

(2) prohibit a funeral provider from engaging in the sale of preneed funeral goods, funeral services, burial site goods, or burial site services if the funeral provider has been found in violation of any provision of this chapter.²³

The term, “regulatory agency,” is defined to include the Commissioner of Health.²⁴ The term “person,” is defined to mean “an individual or a firm, corporation, limited liability company, partnership, association, or other legal entity.”²⁵ The term, “funeral provider,” is defined, in part, to mean “any person that sells or offers to sell funeral goods, funeral services, burial site goods, or burial site services to the public. . . .”²⁶ The terms, “funeral goods,” “funeral services,” “burial site goods,” and “burial site services,” are also

²⁰ Miner Aff., para. 6.

²¹ *Id.*

²² Minn. Stat. § 149A.01, subd. 1.

²³ Minn. Stat. § 149A.08, subd. 1.

²⁴ Minn. Stat. § 149A.02, subd. 37a(1).

²⁵ *Id.* at subd. 32.

²⁶ *Id.* at subd. 22.

defined in the statute.²⁷ The term, “preneed consumer,” is defined, in part, to mean an individual who arranges for funeral or burial site goods and services prior to the death of the individual or another.²⁸ The term, “person,” in subdivision 1(1), is sufficiently broad to include “funeral providers.”

Having established two categories of cease and desist orders in subdivision 1, clauses (1) and (2), the statute proceeds to differentiate between the two when it comes to a stay of the cease and desist order. If a cease and desist order is issued pursuant to subdivision 1, clause (2), a timely request for a hearing to challenge the cease and desist order results in the automatic stay of the order pending that hearing.²⁹ By contrast, if the cease and desist order is issued pursuant to subdivision 1, clause (1), a timely request for a hearing does not automatically stay the order.³⁰ Rather, the person who is the subject of the cease and desist order may accompany a timely request for a hearing with a request for a stay of the order.³¹ The “regulatory agency may, in the regulatory agency’s discretion, grant the stay.”³² If the regulatory agency declines to grant the request for a stay, “the regulatory agency shall refer the request to the Office of Administrative Hearings within three working days from the receipt of the request.”³³ “Within ten calendar days after receiving the request from the regulatory agency, an administrative law judge shall issue a recommendation to grant or deny the stay.”³⁴ Finally, the regulatory agency must “grant or deny the stay within five calendar days of receiving the administrative law judge’s recommendation.”³⁵

Given this statutory scheme, it is critical to determine whether a cease and desist order is issued pursuant to subdivision 1, clause (2) (automatic stay upon timely request for hearing) or clause (1) (stay discretionary with regulatory agency). In this case, Respondents argue that the Cease and Desist Order was issued pursuant to clause (2) and that they are entitled to an automatic stay of the Order.³⁶ Respondents support their argument by reading the word, “preneed,” in subdivision 1, clause (2), as modifying only “funeral goods,” and not the balance of the clause, “funeral services, burial site goods, or burial site services” For Respondents, it follows that “funeral services,” “burial site goods,” and “burial site services,” as those terms are used in clause (2), refer to “at-need” items, as opposed to “preneed” goods and services. The Administrative Law Judge does not agree.

At best, Respondents’ interpretation of the statute is strained. The statutory scheme reflects the intent of the legislature to treat violations that directly threaten public health and safety differently from consumer protection violations. “Preneed

²⁷ *Id.* at subds. 3a, 3b, 21, and 23.

²⁸ *Id.* at subd. 33a.

²⁹ Minn. Stat. § 149A.08, subd. 2a(b).

³⁰ *Id.* at subd. 3.

³¹ *Id.* at subd. 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Respondents’ letter brief dated May 22, 2015 (“Supplemental Letter Brief”).

consumers” are protected from unscrupulous industry practices in the sale of preneed goods and services.³⁷ While protecting “preneed customers” from unscrupulous business practices is important, rarely would such misconduct present imminent risks to public health and safety. Logically, where public health and safety could be compromised, the statute does not provide for an automatic stay. The statutory scheme makes sense only if subdivision 1, clause (2), is interpreted to apply the modifier, “preneed,” to the full list of goods and services set forth therein. The interpretation suggested by Respondents would lead to an absurd result.

Respondents’ argument also ignores the fact that the Department has the discretion under subdivision 1 to issue a cease and desist order pursuant to either clause (1) or clause (2). In this case, the Department has chosen to proceed under clause (1). In the Cease and Desist Order, the Department states, as its authority, Respondents’ continuing violation of the Administrative Penalty Order issued on March 19, 2015.³⁸ Subdivision 1, clause (1), specifically authorizes the issuance of a cease and desist order “to stop a person from violating . . . any . . . order”³⁹ Moreover, the Cease and Desist Order requires the cessation of the present provision of goods and services, and does not prevent the sale of “preneed” goods and services.⁴⁰

For these reasons, the Administrative Law Judge concludes that the Cease and Desist Order was issued pursuant to subdivision 1, clause (1), and that the matter is properly before the Administrative Law Judge pursuant to the provisions of subdivision 4.

As noted above, Minn. Stat. § 149A.08, subd. 4 accords the Department discretion and ultimate authority to decide whether or not to grant a request for a stay. The automatic referral of a request for a stay that is not granted to the Office of Administrative Hearings for a recommendation whether or not to grant or deny the request for a stay in essence provides an independent, but not final, review of the circumstances in a particular case.

Respondents argue that the Administrative Law Judge has broad discretion to fashion relief, for example, by including a recommendation that Respondents be permitted to use their facility for visitations and funerals while the Cease and Desist Order remains in effect.⁴¹ The Administrative Law Judge doubts that subdivision 4 envisions that when ruling upon the stay, judges would decide which operations could safely continue. Even if it did, the hearing record in this case does not make clear which operations should resume.

³⁷ Minn. Stat. §§ 149A.70-.73.

³⁸ Cease and Desist Order at 1.

³⁹ Minn. Stat. § 149A.08, subd. 1(1).

⁴⁰ Cease and Desist Order at 5, 6.

⁴¹ Supplemental Letter Brief.

The Department takes the position that a request for a stay under subdivision 4 is comparable to a motion for a preliminary injunction and should be determined by the Administrative Law Judge, and ultimately by the Department, in accordance with the five so-called *Dahlberg* factors: (1) the pre-existing relationship between the parties; (2) the balancing of harm resulting from the grant or denial of the motion; (3) the likelihood that the moving party will prevail on the merits; (4) public policy considerations; and (5) judicial supervision and enforcement burdens.⁴² In the view of the Administrative Law Judge, the application of the *Dahlberg* factors would be difficult and unhelpful. Little would be gained by an analysis of the pre-existing relationship between the parties, always one of licensing agency and licensee, or of the public policy considerations, which provide the very foundation for the agency's licensing authority. The burden of agency enforcement, which is legislatively mandated, cannot be weighed in the bargain. The likelihood of success on the merits of an appeal from a cease and desist order would be extremely difficult to assess because the record at the point of the request for a stay will invariably be very limited. The balancing of harms, that is, the potential harm to the public versus the monetary harm to the licensee should a stay be denied or granted, is an important consideration in the exercise of agency discretion. On balance, the Administrative Law Judge concludes that the exercise of the discretion accorded in subdivision 4 should not be guided by the application of the *Dahlberg* preliminary injunction factors.

Instead, the Administrative Law Judge, in the determination of his recommendation to the Department, will be guided by the longstanding standard of review of the exercise of discretion by an administrative agency. The exercise of administrative discretion will be upheld unless it was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it."⁴³ This standard requires the clear explication of the decision made, the evidence in the record that supports the decision, and the rationale underlying the decision.

IV. Recommendation

For the following reasons, the Administrative Law Judge recommends that the Commissioner of Health deny Respondents' request for a stay of the Cease and Desist Order. The findings in the Cease and Desist Order are based upon first-hand observations, during multiple inspections of Respondents' funeral establishment, of extremely unclean and unsanitary conditions in the receiving and embalming rooms, and the presence of several dead human bodies in varying states of decomposition.

Respondents have admitted that a thorough cleaning of the facility is needed, and have offered no evidence that the conditions have been abated. Such conditions in a funeral establishment present a direct and present threat to the well-being of the members of the public who have entrusted the final disposition of the bodies of their

⁴² *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn.1965).

⁴³ *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992) (quotation omitted).

deceased loved ones to the funeral establishment. The potential harm to the public if the request for a stay is granted is great.

If the request for a stay is denied, Respondents will be unable to provide “at-need” funeral and burial site goods and services until a determination of their appeal or until they reach some accord with the Department.⁴⁴ This inability to do business will cause some financial harm to Respondents, although that harm has not been quantified.

The Administrative Law Judge concludes that the potential harm to the public, if the Cease and Desist Order is stayed, far outweighs the potential financial harm to Respondents, should the request for a stay be denied. Accordingly, the Administrative Law Judge respectfully recommends that the Commissioner deny Respondents’ request for a stay of the Cease and Desist Order.

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⁴⁴ Respondents are not prohibited by the Cease and Desist Order from marketing “preneed” goods and services.